S.B. Civil Writ Petition No. 2236/2005
LRs of Nathi Lal
vs
Shivdan Singh & Ors

Date of order : 1.11.2007.

HON'BLE MR. PRAKASH TATIA, J.

Mr.Suresh Shrimali]
Mr.Rajesh Choudhary], for the petitioner.
Mr.LN Sharma, for the respondents.

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Heard learned counsel for the parties.

The petitioner-defendant submitted an application under section 90 of the Evidence Act for drawing presumption about the Will dated 13th Nov., 1948. Said application of the petitioner-defendant was dismissed by the trial court only on the ground that the issues have already been framed and burden to prove the Will as per the issue no.9 is upon the defendant, therefore, there is no justification for drawing presumption about the due execution of the Will under Section 90 of the Evidence Act.

Learned counsel for the petitioner submitted that the reason given by the court below for rejecting the petitioner's application filed under Section 90 of the Evidence Act by impugned order dated 6th April, 2005 is contrary to law as well as contrary to the law laid down by the Division Bench of this Court in the judgment delivered in Hazarilal

& anr. Vs. Sh. Shyamlal & Ors reported in 207(1) WLC (Raj.) 789 wherein issue was referred to the Division Bench by this Court for considering of the law laid down by earlier judgments of this Court with respect to the time by which the presumption under Section 90 of the Evidence Act can be drawn.

According to learned counsel for the petitioner in view of the earlier judgments as well as Division Bench judgment of this Court, a party can claim drawing of presumption under Section 90 of the Evidence Act at any stage of the suit as well as even at the appellate stage also.

Learned counsel for the respondents submitted that when document is suspicious and it was not executed in ordinary course of things then presumption cannot be drawn about the execution of the said document under Section 90 of the Evidence Act as held by this Court in Kapporchand Vs. Lalchand reported in 1974 RLW 579 and also the same view was taken by the Karnataka High Court in the case delivered in Kempamma Vs. Kalamma & Ors reported in AIR 1992 Karnataka 282.

I considered the submissions of learned counsel for the parties and perused the facts of the case and the reasons given by the trial court in its impugned order dated 6th April, 2005. It appears from the impugned order that only reason given by the trial

court for rejecting the petitioner's application is that since the issue has been raised about the Will and its execution and burden to prove the issue is upon the defendant, therefore, at this stage, presumption cannot be drawn under Section 90 of the Evidence Act about the Will dated 13th Nov., 1948.On the face of it, the reason given by the court below is contrary to law itself as the Section 90 of the Evidence Act clearly provides that where any document purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

There is specific reason and object behind enacting Section 90 of the Evidence Act and the Division Bench judgment of Hazarilal (supra) relied upon by learned counsel for the petitioner clearly says that the presumption under Section 90 of the Evidence Act can be drawn by the Court at any stage even at the stage of pronouncement of the judgment.

In view of the scheme of the Civil Procedure Cod about leading evidence,the burden is placed upon the parties to prove the issues according to their stand taken and according to the admission denial of the parties on document of the rival parties. When presumption is drawn under Section 90 of the Evidence Act then it shifts burden upon the other party to disprove the document. Therefore, it is always desirable that party seeking to draw presumption under Section 90 of the Evidence Act should seek such relief of presumption before framing of the issue so that proper issue may be framed and in case,any presumption is drawn, the issue of rebuttal can be framed so that party may not prejudice in any manner and may lead evidence accordingly. The defendant if will lead evidence on issue no.9 then that will be a leading evidence to prove the due execution of the document itself. There will be no useful purpose for drawing presumption when document either is proved by evidence or party failed to prove the document by his own evidence and after taking full opportunity from the court.

In view of the above reason, the trail court did not exercise is jurisdiction vested in it and accordingly, rejected the application filed under Section 90 of the Evidence Act.

So far as judgment of this Court delivered in the case of Kapoorchand (supra) and the judgment of the Karnataka High Court delivered in the case of Kempamma (supra) they clearly lays down the guideline by which the court may be guided for drawing presumption of the execution of the document under Section 90 of the Evidence Act. They nowhere deals with the issue for presumption when issue has been framed putting burden on party to prove the document then the presumption can be drawn by the court nor they lays down that the presumption under Section 90 of the Evidence Act cannot be drawn after at particular stage of suit. In view of the above, the aforesaid judgments have no application to the facts of this case.

In view of the above, the writ petition of the petitioner is allowed and the impugned order dated 6th April, 2005 is set aside. The trial court is directed to decide whether it is a fit case for drawing presumption about the Will dated 13th Nov., 1948 or not and for that purpose, may get guidance from the judgments referred above.

(PRAKASH TATIA), J.

c.p.goyal/-